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Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Wireless 911 "Strongest Signal")	CC Docket No. 94-102
Proposal Filed By Ad Hoc Alliance)	DA 98-1936
For Public Access to 911)	

COMMENTS OF TRUEPOSITION

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ATTORNEYS FOR TRUEPOSITION, INC.

October 7, 1998

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COMMENTS OF TRUEPOSITION

TruePosition, Inc. hereby submits its Comments in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

Facing continued opposition from the public safety community as well as questions concerning the implementation of strongest signal, the Ad Hoc Alliance for Public Access to 911 ("Alliance") has offered the Commission an alternative to its strongest signal proposal: "adequate signal."² This proposal is the subject of the latest variant of a Commission inquiry that began in 1995. In the Further Notice of Proposed Rulemaking in the above-captioned docket, the Commission first sought comment on a proposal by the Alliance to require all cellular 9-1-1 calls be

¹ Additional Comment Sought: Wireless 911 "Strongest Signal" Proposal Filed by Ad Hoc Alliance for Public Access to 911, CC Docket No. 94-102, *Public Notice*, DA 98-1936 (Sept. 22, 1998).

² See *Ex parte* presentation filed by the Alliance on Sept. 17, 1998 at 1 ("Alliance *ex parte* of Sept. 17, 1998") ("We have proposed to NENA and APCO that their concerns can be satisfied by selection of the strongest signal if the signal from the user's provider is 'inadequate' at the time the 9-1-1 call is placed.")

carried over the network of the carrier with the strongest forward control channel signal.³ The Commission has since received comments on this matter from public safety organizations, wireless carriers, manufacturers, and a host of interested parties, including TruePosition -- all of whom agree that a strongest signal requirement would not foster the Commission's ultimate objectives in this proceeding. In fact, only one party has ever supported its inclusion in the Commission's E911 mandate, the Alliance.

The Alliance's most recent proposal for an "adequate" signal fails to alleviate the concerns raised throughout this proceeding. Though the Alliance has presented the adequate signal option as a solution to the public safety concerns arising from strongest signal, the proposal is, in fact, a different iteration of the same plan with the same problems relying upon the same technology. The Trott report commissioned by the Alliance presents no new research into these matters and, in a seemingly results driven analysis, fails to explain away the outstanding problems of strongest signal. The report does not consider whether the adequate signal proposal will in fact eliminate any of the outstanding concerns regarding strongest signal that have been noted by commenters in this proceeding. In addition, no evidence is provided to dissuade the public safety

³

Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676, at ¶ 144 (1996) ("Report and Order and Further Notice of Proposed Rulemaking").

community that adequate signal will not needlessly eliminate one carrier's signal or deter the early deployment of automatic location identification technology. Without such analysis, the record presently before the Commission requires rejection of both of the strongest signal proposals.

As the record continues to demonstrate, the Alliance has never adequately proven that a problem exists requiring Commission action. Moreover, the new proposal does not address concerns that implementation of either of these mandates would thwart the early deployment of Automatic Location Information ("ALI"), a stated Commission objective. The proposal neither answers important public safety concerns over the burdens it will place on carriers' networks, nor does it discuss the merits of A-B roaming -- a solution favored by other commenters, including the public safety community, and one which would not serve to delay deployment of Phase II technology.⁴ In the end, however, if the Commission were to disregard these concerns and favor an adequate signal mandate, it should, at a minimum, designate this highly technical matter to the appropriate standards-setting bodies. Dispatching the technical details of this matter to the appropriate standards-setting bodies is the only proper means of resolving these issues.

Rather than diverting Commission resources to further pursue this adequate signal proposal, the Commission should end this

⁴ See, e.g., *Ex parte* filing of NENA, APCO, and NASNA at 3, CC Docket No. 94-102 (filed Feb. 23, 1998) ("Public Safety commenters").

inquiry and commit its limited resources to resolving outstanding issues which are, in fact, presently delaying the deployment of both Phase I and Phase II technology. The Commission has yet to resolve the interoperability questions first raised in February⁵ and recently the subject of a Petition by the State of California.⁶ Other important issues which may be affecting the deployment of improved access to 9-1-1, including matters relating to cost recovery and limited liability, have been brought to the Commission's attention without final resolution. Moving forward with additional obligations such as adequate signal before addressing these more pressing matters seems likely to further delay the realization of the true benefits of the Commission's wireless E9-1-1 mandates: "assisting people to live safer . . . lives."⁷

⁵ See CTIA Petition for Reconsideration and Clarification of the Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Memorandum Opinion and Order at 16-18 (filed Feb. 17, 1998) ("CTIA Petition for Reconsideration").

⁶ Wireless Telecommunication Bureau Seeks Comment on Request for an Emergency Declaratory Ruling Filed Regarding Wireless Enhanced 911 Rulemaking Proceeding, CC Docket No. 94-102, Public Notice (July 30, 1998).

⁷ Remarks by William E. Kennard, Chairman, Federal Communications Commission, to Personal Communications Industry Association of America, Sept. 23, 1998 at 3.

II. THE ADEQUATE SIGNAL PROPOSAL DOES NOT EASE THE CONCERNS OVER STRONGEST SIGNAL THAT ARE WELL-DOCUMENTED IN THIS PROCEEDING.

A. Both The Strongest And Adequate Signal Proposals Are Solutions Searching For A Problem Sufficiently Extensive To Warrant Commission Intervention.

Once again, the Alliance has sought to begin the discussion around technical considerations without addressing what must be the Commission's initial inquiry: whether a demonstrable need for any such regulation exists. As TruePosition has previously maintained, the strongest signal proposal, and now adequate signal, asks the Commission and the industry to assume that there is presently a deficiency in cellular networks requiring government intervention.⁸ The Alliance has had ample opportunity to present its case. Yet over three years, the single proponent of mandating this rule has failed to prove the extent to which cellular callers are unable to obtain assistance when they dial 9-1-1. In fact, the record presently before the Commission would suggest otherwise, with over 83,000 emergency wireless calls completed each day.⁹

The adequate signal option does not alter the fact that the only support the Alliance could muster for any such rule are two admittedly grim incidents, one in 1994 and the other in 1997, when callers needing emergency assistance failed to obtain a

⁸ Ex parte filing of TruePosition at 1-4, CC Docket No. 94-102 (filed July 17, 1998) ("TruePosition Legal Analysis of Strongest Signal") (Attachment A).

⁹ TIA Committee TR45, Standards Requirement Document, submitted by CTIA June 3-4, 1998 ("Standards Requirement Document").

usable voice channel.¹⁰ While the two instances are tragic, two anecdotes and a field study with limited probative value do not establish a systematic problem warranting Commission regulation. Thus, the Alliance has failed to prove the extent to which the present deployment of cellular networks and their emergency services are not meeting the public safety demands of the nation. Furthermore, without demonstrating that a problem exists, the Alliance has been unable to show the benefits of its adequate or strongest signal proposals and their effect on the ability of callers to access emergency assistance in any quantitative sense.

The appropriate issues before the Commission are (1) whether so significant a percentage of emergency calls are not getting through to public safety officials that a government mandate is warranted; and, equally important (2) whether there is a cost-effective mandate available. Failing to establish the extent of failed call attempts, thus failing to prove that Commission intervention is warranted, requires rejection of a proposed "solution" under principles of administrative law. Though the Commission has expansive authority to implement comprehensive regulations that are in the public interest, such as the E911 mandates in this docket, "'regulation perfectly reasonable and

¹⁰ See Ex parte filing of Alliance, CC Docket No. 94-102 (dated Mar. 18, 1998) ("Alliance ex parte of Mar. 18, 1998"); ex parte filing of Alliance, CC Docket No. 94-102 (Feb. 3, 1998). The Alliance has also performed signal strength tests in three cities which, when looked at closely, only prove the obvious, that carriers' signal strengths vary from place to place. Comments of the Alliance Concerning the Further Notice of Proposed Rulemaking at Appendices B and C (filed Sept. 25, 1996).

appropriate in the face of a given problem may be highly capricious if that problem does not exist."¹¹ In this instance, the record indicates that both the strongest and adequate signal proposals are solutions to a problem that has not been proven to exist, hence rejection of both proposals is warranted.

B. Implementation Of Adequate Signal, Like Mandating Strongest Signal, Would Serve As A Disincentive To Carriers Considering Deployment Of ALI Prior To The Phase II Deadline.

One issue that has consistently remained at the forefront of the Commission's policy objectives in this proceeding is the implementation of ALI. As it has noted, ALI "permits rapid response in situations where callers are disoriented, disabled, unable to speak, or do not know their location. . . . ALI permits the immediate dispatch of emergency assistance. . . . [and] ALI also reduces errors in reporting the location of the emergency and in forwarding accurate information to emergency personnel."¹² NENA, APCO, and NASNA have told the Commission matter of factly that "we can't help them if we can't find them."¹³ The record demonstrates, however, that a Commission mandate of any version of the strongest signal proposal would serve as a deterrent to wireless carriers to deploy ALI prior to the Phase II deadline.¹⁴

¹¹ Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 36 (D.C. Cir. 1977) (citation omitted) (emphasis added).

¹² Report and Order and Further Notice of Proposed Rulemaking at ¶ 5.

¹³ See Public Safety commenters at 3.

¹⁴ See id. at 2-3; ex parte filing of TruePosition at 2, CC Docket No. 94-102 (filed June 1, 1998) (Attachment B); TruePosition Legal Analysis of Strongest Signal at 8-9.

Under both proposals, the carrier providing presubscribed service is not guaranteed to be the carrier transmitting 9-1-1 calls for its customers even when it provides a usable voice channel. Only in those situations in which the subscriber is calling from a location where the carrier's control channel meets the "adequate signal" standard selected by the Alliance will such a call be carried on the presubscribed carrier's network. Thus, a consumer who has subscribed to a carrier because it provides better safety protections through ALI would not be assured that the enhanced safety features always would be available. Because a carrier deploying ALI could not guarantee that it could locate subscribers when they call 9-1-1, it is less likely that it would invest in technology that may not always be available to its subscribers prior to the Commission mandated deadline for doing so. This dilemma also raises obvious concerns regarding marketing of services and possible exposure to excessive liability.¹⁵

The Commission should not seek to adopt requirements which have the unintended consequence of thwarting already-established

¹⁵ Many commenters in this proceeding have demonstrated to the Commission the problems carriers face because of their exposure to unlimited liability. The Commission should resolve this matter and establish a national standard of limited liability for wireless E911 service pursuant to the recommendations in the record or at least extend state liability standards for wireline carriers to CMRS providers. See Comments of TruePosition to Request For an Emergency Declaratory Ruling by the State of California Regarding Wireless Enhanced 911 Rulemaking Proceeding, Public Notice, CC Docket No. 94-102 at 3-4 (filed Aug. 14, 1998); CTIA Petition for Reconsideration at 13.

Commission objectives. Requiring carriers to transmit calls pursuant to the Alliance's standards would have such a result.

C. The Adequate Signal Proposal Does Not Resolve The Many Concerns Raised By The Public Safety Community.

In their comments to the strongest signal proposal, the various public safety organizations which have actively participated in this proceeding provided detailed objections to its adoption. In addition to its effect on carrier deployment of ALI, these organizations oppose strongest signal because of the harm it would cause to wireless networks and their ability to complete emergency calls. They recognized immediately that by forcing all emergency callers within a specified area to utilize only one carrier, the Alliance's proposal would effectively reduce available network capacity to manage multiple calls.¹⁶ Instead, the public safety community favors adoption of cellular A-B roaming when 9-1-1 is dialed. Though the Alliance may claim otherwise, the proposed adequate signal option has not been proven to alleviate these public safety concerns.

The adequate signal proposal has the same fundamental flaws as strongest signal. Namely, anywhere one cellular carrier's signal fails to meet the Alliance's standard (similar to being the weaker of the two cellular signals in the previous proposal), the emergency caller will be shifted to the other carrier.¹⁷ In any particular area, if one carrier's signal is below the

¹⁶ Public Safety commenters at 3.

¹⁷ In fact, the technology proposal under this threshold requires a search of all control channels for the strongest one.

Alliance's standard, all emergency calls in that area will be transferred to one network. Thus, public safety concerns that one carrier may be needlessly eliminated from handling emergency calls remains unanswered by the adequate signal proposal.

Even more importantly for the Commission's purposes, it should be noted that the exact impact of such a potential problem is unknown because the Alliance has not provided any empirical support for its adequate signal proposal. As the proponent of this rule change, the obligation is upon the Alliance to establish the frequency with which existing cellular signals would fail its adequacy standard.¹⁸ For instance, the Alliance does not explain the extent to which its adequate signal proposal diverges from its strongest signal proposal in terms of calls transferred from one carrier to another. Without such information there is no basis upon which to review the latest Alliance proposal.

Most of the commenters in this proceeding, including the public safety community and TruePosition, favor adoption of cellular 9-1-1 A-B roaming.¹⁹ Once again, the Alliance stands alone, objecting to this solution because it believes that the A-

¹⁸ The Commission has an obligation to "'explain how [it] resolved any significant problems raised by the comments, and to show how that resolution led [it] to the ultimate rule. . . .'" Action on Smoking and Health v. C.A.B., 699 F.2d 1209, 1216 (D.C. Cir. 1983) (citation omitted). In this instance, the record has a dearth of information from which the Commission could rely to resolve the apparent conflicts in favor of a new adequate signal requirement.

¹⁹ See Public Safety commenters at 4 ("A better way to address the 'coverage holes' identified by the Alliance may be to simply program the cellular phones for A/B or B/A.")

B roaming solution would not have been effective in one of the two incidents on which it reports.²⁰ Regardless of whether A-B roaming would have worked in the one instance noted by the Alliance, or whether even the Alliance's proposal would have resulted in a different outcome,²¹ imposing a burdensome obligation opposed to by all commenters less one, including public safety, would seem to be arbitrary decision making.

Ultimately the Commission's investigation into this proposal must consider why adequate signal should be implemented rather than why it should not. The Alliance has not proven that it should. Without such a demonstration the Commission should not go forward with the Alliance's proposal. Moreover, every other commenter has demonstrated why these types of proposals would not be in the public interest, seeming only to favor the interests of the Alliance. Under basic principals of administrative law, the Commission cannot take final action without first "tak[ing] a 'hard look' at the salient problems"²² raised by commenters

²⁰ The Alliance contends that A-B roaming would not prevent the incident in which Ms. Dolores Lechuga was unable to have her voice call transmitted while the phone had registered with a control channel. The Alliance also contends that this incident would not have occurred had the handset been equipped with strongest signal technology. Alliance *ex parte* of Mar. 18, 1998.

²¹ A review of the Alliance's presentation of the call details of this incident shows that none of the call attempts were to "9-1-1," thus, the caller would not have been switched to the strongest or adequate signal even if it had been deployed.

²² Greater Boston v. F.C.C., 444 F.2d 841, 851 (D.C. Cir. 1971).

opposing these strongest signal proposals.²³ Finally, there appears to be no reason in the record for ignoring the concerns of the public safety community and adopting a burdensome requirement, especially when a less burdensome option is present in A-B roaming.

III. THE TECHNICAL DETAILS OF ANY NEW REQUIREMENT FOR THE PROVISION OF E911 SERVICE SHOULD BE CONSIDERED BY THE APPROPRIATE TECHNICAL BODIES ALREADY CHARGED WITH SIMILAR RESPONSIBILITIES.

Beginning in 1994, associations representing the various public safety communities and wireless telecommunications carriers joined together for the purpose of promoting consumer access to wireless emergency services. It is this well-documented effort that furthered the Commission's efforts to implement its wireless E911 mandates.²⁴ By working together within an organized framework, the industry and the public safety groups were able reach a consensus agreement on many of the issues for which the Commission sought comment, including several highly technical matters.²⁵ Since then, these organizations have continued to work together through the Wireless E9-1-1 Implementation Ad Hoc group ("WEIAD") to develop the technical

²³ See Achernar Broadcasting Co. v. F.C.C., 62 F.3d 1441, 1446-47 (D.C. Cir. 1995) (quoting Cities of Carlisle and Neola, Iowa v. F.E.R.C., 741 F.2d 429, 433 (D.C. Cir. 1984) ("Failure to weigh the entire record would constitute reversible error . . . 'While agency expertise deserves deference, it deserves deference only when it is exercised; no deference is due when the agency has stopped shy of carefully considering the disputed facts.'"))

²⁴ Report and Order and Further Notice of Proposed Rulemaking at ¶¶ 15-23.

²⁵ See id. at ¶ 23.

and operational standards to satisfy the Commission's wireless E911 requirements.²⁶

The Alliance has participated in WEIAD's efforts. It presented its strongest signal proposal to WEIAD which reviewed it last January. The Alliance, however, chose to bypass this group for its latest strongest signal proposal. The WEIAD reported earlier this year to the Commission that it had already engaged in an in-depth analysis of the strongest signal proposal and had produced a draft report and recommendation.²⁷ According to the WEIAD report, the public safety and wireless communities favored expeditious review of the Alliance's strongest signal proposal by the appropriate Standards Development Organization ("SDO").²⁸ The Alliance, however, did "not believe that such a reference is appropriate because it maintains that its petition does not seek a change in the existing standard, or in the interoperability 'standards' or 'common air Interfaces' that have been established."²⁹ The public safety and wireless representatives disagreed, concluding such a matter is itself to be resolved by the appropriate SDO. The consensus group went ahead without the Alliance's support and properly concluded that this matter must be referred to the appropriate SDO. In June, the WEIAD members filed a Standards Requirement Document for

²⁶ See Report of CTIA, PCIA, APCO, NENA, NASNA, Alliance, CC Docket 94-102 at 2-3 (filed Jan. 30, 1998).

²⁷ Id. at 8-9.

²⁸ Id. at 11.

²⁹ Id.

strongest signal with the Telecommunications Industry Association ("TIA"), an association of both vendors and carriers that develops technical and operating standards.³⁰

If the Commission were to conclude that the concerns raised in this proceeding by the public safety community and by wireless carriers should be disregarded in favor of implementing the adequate signal proposal, it should not do so at the expense of the effort expended by WEIAD and TIA, nor the loss of their expertise. The Alliance has concluded that the proper standard for its adequate signal proposal is -85dBm for noise limited systems or -80dBm for interference limited systems.³¹ Whether this is truly an "adequate" signal is not something the Commission can properly deduce from the Trott Report's two page analysis. Rather, if the Commission decides to adopt some sort of adequate or strongest signal requirement, it should establish broad performance criteria, allowing the appropriate standards-setting bodies to develop operational and technical requirements.³² Concluding otherwise would be an extraordinary step, circumventing normal procedures and placing the Commission in the unenviable position of the standards setting body for wireless E911.

³⁰ Standards Requirement Document.

³¹ Alliance *ex parte* of Sept. 17, 1998 at Appendix.

³² See, e.g., Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, 11 FCC Rcd 8352 at ¶ 48 (rel. July 2, 1996).

Though the Alliance has commissioned its own engineering report, many issues still must be addressed by the standards-setting bodies. For example, the parties do not agree over the appropriate relationship between the strength of the control channel and the quality of the voice communication. The Alliance and its engineering reports have been unable to resolve this dispute. Issues such as this would be more appropriately resolved by the technical experts working for the WEIAD and TIA, than through comments before the Commission. We thus support the unanimous recommendation of all three relevant public safety groups that this matter be referred to and resolved by WEIAD and TIA.³³

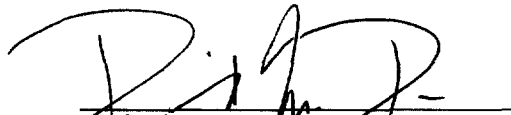
³³

Ex parte presentation filed by the National Emergency Number Association on Sept. 22, 1998 ("[W]e urge that the Commission charge appropriate technical bodies with the task of determining the parameters of adequate communications."); *ex parte* presentation filed by the APCO and NASNA on Sept. 21, 1998.

IV. CONCLUSION

For these reasons, TruePosition respectfully requests that the Commission conclude its inquiry into both the strongest and adequate signal proposals consistent with these comments.

Respectfully submitted,



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ATTORNEYS FOR TRUEPOSITION, INC.

October 7, 1998

WILLKIE FARR & GALLAGHER

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: Revision of the Commission's Rules to Ensure
Compatibility with Enhanced 911 Emergency Calling
Systems, CC Docket No. 94-102.

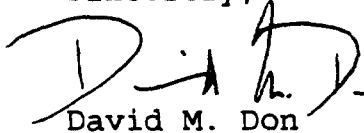
Dear Ms. Salas:

Pursuant to the Commission's rules, enclosed please find two copies of the attached letter and the enclosed strongest signal analysis which were sent today to the following:

Chairman William E. Kennard
Commissioner Gloria Tristani
Commissioner Michael Powell
Ari Fitzgerald
Paul E. Misener
Peter A. Tenhula
Nancy Boocker
F. Ronald Netro
Won Kim

Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Daniel Phythyon
David Wye
Karen Gulick
David R. Siddall
John Cimko, Jr.
Martin Liebman

Sincerely,


David M. Don

Enclosure



TruePosition™
Wireless Location System

July 17, 1998

Re: Revision of the Commission's Rules to Ensure
Compatibility with Enhanced 911 Emergency Calling
Systems, CC Docket No. 94-102.

Dear :

I have enclosed for your information a legal analysis of the strongest signal proposal prepared by Willkie Farr & Gallagher. It concludes that the proponent of this proposal has failed to meet the administrative law threshold for the creation of new regulatory requirements. Because the proponent has failed to prove that a systematic problem exists, and that its proposal can survive the scrutiny of even a minimal cost benefit analysis, the Commission should not impose a strongest signal requirement on wireless carriers.

I hope you find this analysis helpful in your deliberations. If you would like to discuss this further, or TruePosition's views on other E911 issues, please feel free to call.

Sincerely,

Michael Amarosa

Enclosure

cc: Magalie Roman Salas

WILLKIE FARR & GALLAGHER

Washington, DC
New York
London
Paris

LEGAL ANALYSIS OF THE STRONGEST SIGNAL PROPOSAL FOR WIRELESS E911

Introduction

The Commission has provided two opportunities for comment on the so-called strongest signal proposal since 1995.¹ Only one party has supported its inclusion in the wireless E911 mandates, the Ad Hoc Alliance for Public Access to 911 ("Alliance").

In this matter, as in administrative law generally, the proponent of a new government requirement must carry the burden of proving that the requirement is necessary and cost effective. This the Alliance has been unable to do. On the basis of the record assembled, the Commission must conclude that:

- strongest signal supporters have been unable to prove that a need exists for a new rule;
- the asserted benefits of the strongest signal requirement are exceeded by its costs.

I. The Ad Hoc Alliance Has Failed To Adequately Demonstrate A Problem Requiring Commission Resolution.

Although perhaps obscured by extensive discussion of the technical considerations which may support adoption or repudiation of the strongest signal requirement, there is a fundamental administrative law requirement that must be met: the Commission must satisfy itself that a demonstrable need for the proposed regulation exists. Though the Commission has expansive

¹ Comments were first filed in November, 1995 and once again in response to the Further Notice of Proposed Rulemaking in the above-captioned docket.

authority to implement comprehensive regulations that are in the public interest, such as the E911 mandates in this docket, "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."² In this instance, the record indicates that the strongest signal proposal is a solution searching for a problem sufficiently extensive to warrant government intervention.

Examination of the Alliance's claims reveals a shifting basis for seeking Commission action. Explicitly, the Alliance contends that there is an intrinsic public benefit to be realized if calls are transmitted over the strongest signal. In other words, transmission of calls along the strongest signal is an end in and of itself.³ Implicitly, the Alliance would have the Commission infer from two tragic anecdotes that cellular callers have been unable to reach assistance and that this is a network

² Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 36 (D.C. Cir. 1977) (citation omitted) (emphasis added).

³ The record demonstrates that while the strongest signal requirement would secure the strongest control channel, there is no guarantee that the quality of the voice channel over which the call would travel would be better. The public safety community notes that "the strongest control channel will not always deliver the strongest voice channel." Ex Parte filing of NENA, APCO, and NASNA at 2, CC Docket No. 94-102 (filed February 23, 1998) ("Public Safety Commenters"). Bell Atlantic NYNEX Mobile clarifies that "the call set-up channel that measures the strength of the signal is not the channel on which the call is actually completed. These two channels are unrelated. A 'strongest signal' standard could not measure either traffic or interference levels on the call delivery channel. The strength of the signal, therefore, is not necessarily an indication of the ability to complete a call." Comments of Bell Atlantic NYNEX Mobile at 6 (filed September 25, 1996).

wide deficiency requiring government intervention.⁴ Neither proposition is sustainable on the present record, and, in any event, the Alliance's strongest signal solution is an inadequate response.

Through its anecdotal evidence, the Alliance would have the Commission conclude that evidence of some cellular calls not getting through is evidence of too many calls not getting through. Some calls may not reach PSAPs as a result of tower siting constraints and the fact that wireless networks are still being constructed. Even when fully developed, limitations such as radio propagation characteristics and the fact that networks are built where customers make calls most likely means that coverage will never be universally perfect.

Concluding that these two specific incidents demonstrate a systematic problem, however, requires a leap of faith not permitted by administrative law. The record presently before the Commission does not establish a systematic inability of cellular users to obtain emergency assistance. On the contrary, it shows that over 83,000 wireless calls to 9-1-1 are completed each day.⁵ It is incumbent upon the Alliance to prove that the strongest signal solution is not only technically feasible, but that it

⁴ The Alliance has presented two admittedly grim instances, one in 1994 and the other in 1997, when callers needing emergency assistance failed to obtain a usable voice channel on their presubscribed carrier. See Ex Parte filing of Alliance, CC Docket No. 94-102 (March 27, 1998); Ex Parte filing of Alliance, CC Docket No. 94-102 (February 3, 1998).

⁵ TIA Committee TR45, Standards Requirement Document, submitted by CTIA June 3-4, 1998.

will satisfy a public interest exigency -- a responsibility the Alliance has failed to discharge.

Over almost three years of comment on this issue, the Alliance has not proven the extent to which cellular callers are unable to obtain assistance when they dial 9-1-1. While the Alliance has performed signal strength tests in three cities and proven the obvious, that carriers' signal strengths vary from place to place, it has not demonstrated that these variations are an impediment to reaching the PSAP.⁶ The appropriate issue before the Commission is not whether calls are traveling along the strongest control channel, or whether causing them to do so is feasible, but rather whether emergency calls are getting through to public safety officials.⁷ While the two well-publicized instances where callers were unable to obtain a usable voice channel are tragic, two anecdotes and a field study with very limited probative value do not establish a systematic problem warranting FCC regulation.

⁶ Comments of the Ad Hoc Alliance for Public Access to 911 Concerning the Further Notice of Proposed Rulemaking at Appendices B and C (filed September 25, 1996) ("Alliance Comments").

⁷ See Home Box Office, 567 F.2d at 37 ("Setting aside the question whether siphoning [of programming from broadcast stations to cable] is harmful to the public interest, we must next ask whether the record shows that siphoning will occur.") Similarly, the record must show that emergency calls are not reaching PSAPs because they are being transmitted on the weaker control channel.

II. The Asserted Benefits Of A Strongest Signal Requirement Are Exceeded By Its Costs.

In considering and promulgating regulations, the Commission is obligated to undertake at least a minimal cost benefit analysis and to attempt to identify the most effective means for realizing its goals.⁸ This deliberation must necessarily take note of the scant record supporting strongest signal. Were the Commission to conclude, however, that existing holes in cellular coverage are a safety problem warranting a government mandated, industry-wide solution, it is incumbent on the Commission to not only consider alternative proposals,⁹ but to adopt the most effective solution.¹⁰

⁸ If the Commission determines that there is a sufficient problem warranting government intervention, there must be a "rational connection between the facts found and the choice made." Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962). Thus, the Alliance has the burden of proving that the transmission of calls along the strongest signal must bear a relationship to the ability of callers to access emergency assistance. See Cincinnati Bell Telephone Co. v. F.C.C., 69 F.3d 752, 759 (6th Cir. 1995) (rebuffing the Commission's twenty percent cellular attribution standard as bearing "no relationship to the ability of an entity with a minority interest in a Cellular licensee to obtain a Personal Communications Service license and then engage in anti-competitive behavior."); Aeronautical Radio, Inc. v. F.C.C., 928 F.2d 428, 447 (D.C. Cir. 1991) (overturning the imposition of a cash-only deposit to prove financial viability because the "cash-only requirement bore no apparent relation to the true financial fitness.")

⁹ See Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 48 (1983) (holding that an "alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment.")

¹⁰ See Cincinnati Bell Telephone, 69 F.3d at 761 (6th Cir. 1995) ("The FCC is required to give an explanation when it declines to adopt less restrictive measures for promulgating its rules. . . . The FCC's conclusory statements, that its rule is based on 'common sense' economic conclusions . . .